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Issue date: 20Aug2002

CASE NO.: 1999-LHC-2444

OWCP NO.: 01-145271

BRB NO.: 01-398

In the Matter Of:

MICHAEL PRESTON
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insurer

APPEARANCES:

Marcia J. Cleveland, Esq.
For the Claimant

Stephen Hessert, Esq.
For the Employer/Self-Insurer

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER ON REMAND - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearings were held on April 17 and 19, 2000 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

PROCEDURAL HISTORY

This Administrative Law Judge, by **Decision and Order - Denying Benefits** issued on January 2, 2001, concluded that Michael J. Preston ("Claimant" herein) had not established a work-related injury, that any disability that he is experiencing "is due to a personal, familial or genetic neurological disorder" and that he was not entitled to any benefits from the self-insured Employer. Claimant timely filed an appeal from the denial of his claim and the Benefits Review Board, by **Decision and Order** issued on January 15, 2002, reversed the denial of benefits and has remanded the claim to this Administrative Law Judge for further proceedings in accordance with their instructions.[1]

As the Board's decision is non-published, I shall quote liberally from the decision for ease of reference by the parties and reviewing authorities. As the Board states in its usual prologue,

"Claimant appeals the Decision and Order Denying Benefits (1999-LHC-2444) of Administrative Law Judge David W. Di Nardi rendered on a claim filed pursuant to the provisions of the Longshore and

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[1]This matter is another example of cases involving my decisions wherein the Board has clearly usurped the functions of this Administrative Law Judge, has clearly substituted its opinions for this trier-of-fact who presided over two days of formal hearings and who alone had the opportunity to hear the testimony and judge the credibility of the witnesses testifying under oath before me. In certain of my cases the Board has treated the Section 20(a) presumption as virtually an irrebuttable presumption. This matter, in my judgment, is another of those cases. However, the Board's decision is the "Law of the Case" and I am constrained to follow the decision of the Board. Realistically, I cannot state in this decision that the Board's decision is erroneous. That conclusion is the province of the U.S. Court of Appeals for the First Circuit and I eagerly await their decision. In this regard, I find most noteworthy the holdings of that Court, in another context, in a matter over which I presided in **Dantran, Inc. v. U.S. Dept. of Labor**, 171 F.3d 58 (1st Cir. 1999) (Findings of administrative law judge (ALJ), not administrative review board, were entitled to deference in proceedings under McNamara-O'Hara Service Contract Act, as board's function was limited to that of appellate review for clear error. Walsh-Healy Act, §5, 41 U.S.C.A. §39; 27 C.F.R. §§ 8.1(d), 8.9(b). On appellate review, courts are entitled to expect, at a minimum, that an agency which rejects factfinding of an administrative law judge (ALJ) will provide a rational exposition of how other facts or circumstances justify such a course of action. Even in instances in which courts defer to the agency as opposed to the hearing officer, judicial scrutiny becomes more exacting when the agency overturns a hearing examiner's credibility-based findings of fact. When a reviewing court discovers a serious infirmity in agency decisionmaking, the ordinary course is to remand, but such a course is not essential if remand will amount to no more than an empty exercise.)

Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence,[2] are rational, and are in accordance with law.[3] 33 U.S.C. §921(b)(3); **O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.**, 380 U.S. 359 (1965).

"Claimant worked as a rigger and substitute crane operator for employer. In 1998, his hereditary condition of myoclonus multiplex, the involuntary twitching and jerking of his head, neck and upper extremities, allegedly reached sufficient proportions to cause him concern over his ability to safely perform his job. Emp. Ex. 9. Based on his assertions, claimant's doctor, Dr. Carinci, removed him from work as of August 15, 1998. Emp. Ex. 24. Claimant contended the increase in symptoms was due to stress and harassment at work, Tr. at 27-33, and he sought temporary total disability and medical benefits. The administrative law judge denied benefits, finding the Section 20(a), 33 U.S.C. §920(a), presumption rebutted and concluding that Claimant's condition is familial and not work-related.[4] Decision and Order at 34-35. Claimant appeals, and employer responds, urging affirmance.

"Claimant contends the administrative law judge did not properly apply the Section 20(a) presumption with regard to his work-related aggravation of a non-work condition, erred in finding that employer rebutted the presumption, gave inadequate weight to the opinions of the treating physicians, and ignored the evidence which supports claimant's position. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a **prima facie** case. To establish a **prima facie** case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. **Bath Iron Works Corp. v. Brown**, 194 F.3d 1,33 BRBS 162(CRT)(1st Cir. 1999); **Gooden v. Director, OWCP**, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); **Kelaita v. Triple A**

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[2]In my judgment, the Board did not follow the "substantial evidence" rule and has clearly usurped the role of this Administrative Law Judge. I could again deny benefits herein but this would just result in another remand to the OALJ and delay a final ruling by the First Circuit Court of Appeals.

[3]The law in the First Circuit on the nature and extent of the Section 20(a) presumption will be discussed below and it is obvious that the principles relating thereto have been evolving over the last five (5) years not only in the First Circuit but other Circuits as well.

[4]Consequently, the administrative law judge did not address the remaining issues raised by the parties.

Machine Shop, 13 BRBS 326 (1981); **see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP**, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a **prima facie** case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **see also American Grain Trimmers v. Director, OWCP [Janich]**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999)(**en banc**), cert. denied, 120 S.Ct. 1239 (2000); **Gooden**, 135 F.3d 1066, 32 BRBS 59(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. **Universal Maritime Corp. v. Moore**, 126 F.3d 256, 31 BRI3S 1 19(CRT) (4th Cir. 1997); **see also Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 28 BRBS 43(CRT)(1994). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. **Strachan Shipping Co. v. Nash**, 782 F.2d 513, 18 BRBS 45(CRT)(5th Cir. 1986)(**en banc**); **Kubin v. Pro-Football, Inc.**, 29 BRBS 117 (1995). Thus, application of Section 20(a) gives claimant a presumption that the work injury aggravated or contributed to the pre-existing condition, and the employer must present evidence addressing aggravation or contribution in order to rebut it. **See Hensley v. Washington Metropolitan Area Transit Authority**, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), cert. denied, 456 U.S. 904 (1982).

"In this case, the administrative law judge credited the opinions of Drs. Bourne and Kolkin, employer's psychiatry and neurology experts respectively, in finding that neither claimant's myoclonus nor psychological condition was caused by his employment. Indeed, it is undisputed that myoclonus multiplex is a hereditary condition. In addition, the administrative law judge credited Dr. Kolkin's opinion that a comparison of a sample of Claimant's current handwriting with a sample written in 1993 showed no significant changes and, thus, no increased tremors or aggravation of Claimant's underlying condition. Decision and Order at 31, 33; Cl. Exs. 12,20 at 9. The administrative law judge also credited Dr. Bourne's opinion that Claimant does not have a psychiatric disability, but he has a chronic adjustment disorder which is directly related to his myoclonus condition and his alcoholism and is not caused or aggravated by the alleged stressful working conditions.[5] Decision and Order at 33; Emp. Ex. 29. Based on these opinions, the administrative law judge found the Section 20(a) presumption rebutted. Decision and Order at 33. With

[5]Claimant's myoclonus tremors decreased with alcohol intake; thus, he became an alcoholic in his attempts to self-medicate. Claimant has been treated for alcoholism. See Emp. Ex. 27.

respect to the evidence as a whole, the administrative law judge accepted and credited the opinions of these same doctors, as well as the testimony of Mr. Thiboutot, Claimant's supervisor, and he considered significant portions of claimant's testimony to be unreliable. **Id**. at 33-34. Therefore, the administrative law judge concluded that Claimant's disease was not caused or aggravated by Claimant's employment, as there is no evidence that it progressed any further than it would have absent his employment. **Id**. at 35.

"In order to address Claimant's contention that the administrative law judge erred in finding the Section 20(a) presumption rebutted, we must first ascertain on what basis the presumption was invoked. In this case, however, although the administrative law judge stated he invoked the Section 20(a) presumption, Decision and Order at 28, he did so summarily and without explanation. Specifically, the administrative law judge stated:

> In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.,** his essential myoclonus and psychological problems, resulted from working conditions at the Employer's shipyard. The Employer has introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence.

Decision and Order at 28 (emphasis in original). While the administrative law judge identified claimant's allegations as to "harm" and "working conditions," he did not make specific findings on these issues. Most significantly, he did not determine whether the alleged stress and harassment at Claimant's workplace occurred. Without findings evaluating the conflicting evidence on this issue the Board lacks the proper context for considering whether Employer presented substantial evidence in rebuttal. **See Lacy v. Four Corners Pipe Line**, 17 BRBS 139 (1985). Consequently, we must vacate the administrative law judge's decision and remand the case for further consideration regarding whether Claimant established a **prima facie** case for invoking the Section 20(a) presumption. **Id**.

"With regard to the harm, it is undisputed that Claimant has a hereditary condition myoclonus multiplex, and that this condition was not caused by his employment. What is left in question, however, is whether that condition or its symptoms were aggravated by conditions or an accident at work. Answering this question requires findings identifying the accident or working conditions in existence which could have aggravated this condition. Claimant identified November 1, 1997, as the date of injury; however, he did not describe any event or set of events on that date to form the basis for his claim. Rather, he described general occurrences

where he claims to have been harassed at work, **i.e.**, the victim of name-calling, practical jokes, or teasing, and stressful situations with the cranes or clamps which he called "close calls," and he contends these affected his ability to perform his job by increasing symptoms of his movement disorder. TR at 27-33.

"A claim need not be based on a specific accident or event; thus, claimant has stated a proper basis for his claim in testifying to these working conditions. **See Konno v. Young Brothers, Ltd.**, 28 BRBS 57 (1994). If credited, his testimony can establish the working conditions element of his **prima facie** case. Employer, however, presented contrary evidence through testimony of Mr. Thiboutot, who stated that Claimant was a good worker and that his condition did not prevent him from performing his job duties, although toward the end of his employment Claimant asked to be excused from certain work, such as work in the cherry pickers. TR at 74, 80-81. Mr. Thiboutot, who had known claimant for 20 years, believed that Claimant's condition was worse toward the end of his tenure than it was at the beginning, but that it was even worse at the hearing than it had been any time at work. Tr. at 73-74, 80. With regard to co-worker treatment, Mr. Thiboutot acknowledged mutual teasing between claimant and his co-workers, and he stated that Claimant was not being singled out, but he was aware of some of the names co-workers had called claimant over the years. Tr. at 84-86. Mr. Thiboutot further testified that the first and only time claimant approached him with a complaint of people bothering him was in the spring of 1998, Tr. at 91, but he could not recall any accident or unsafe situation caused by claimant's condition. TR. at 93.

"On remand, the administrative law judge must address this evidence and determine whether claimant's working conditions were stressful. In this regard, the administrative law judge must apply long-standing law that work events need not be unusually stressful or severe in order to give rise to a compensable injury. **See Konno**, 28 BRBS 57; **see generally Southern Stevedoring Co. v. Henderson**, 175 F.2d 863 (5th Cir. 1949). Even if work-related stress may seem relatively mild, the issue is the effect of the incidents on claimant. **Id**.

"In addition, it is well-established that symptoms aggravated or exacerbated, even temporarily, by work-related stress constitute a compensable injury. **Crum v. General Adjustment Bureau**, 738 F.2d 474, 16 BRBS 115(CRT)(D.C. Cir. 1984); **Marinelli v. American Stevedoring, Ltd**, 34 BRBS 112 (2000), aff'd, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); **see also Obert v. John T. Clark & Son of Maryland**, 23 BRBS 157 (1990); **Sinclair v. United Food & Commercial Workers**, 23 BRBS 148, 151 (1989); **Cairns v. Matson Terminals, Inc.**, 21 BRBS 252 (1988); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Boone v. Newport News Shipbuilding & Dry Dock Co.**, 21 BRBS 1 (1988). This case law is pertinent in

this case, because the opinion of Dr. Kolkin actually supports a causal connection rather than rebutting it as the administrative law judge found. It is thus apparent that Claimant's assertion that Dr. Kolkin's opinion is insufficient to rebut the Section 20(a) presumption has merit. Dr. Kolkin testified that stress could temporarily worsen the symptoms of Claimant's myoclonus disease. Ex. 20 at 28. He also stated that the increase of the involuntary movements would not be permanent but, rather, would dissipate when the stressor was removed. Cl. Ex. 20 at 36. This opinion is in agreement with that of Dr. Standaert, one of Claimant's treating physicians. Specifically, Dr. Standaert stated: a "stressful environment can cause a temporary worsening of the twitching and shaking symptoms related to the myoclonus." Emp. Ex. 25 (Feb. 18, 1999 report). He also reported that "when the stress was removed,... the symptoms would return to their previous state." **Id**.

"**This medical evidence supports the conclusion that stressful working conditions could have aggravated claimant's condition. In this regard, the courts have held that an aggravation is compensable regardless of whether the employment actually altered the underlying disease process or whether it merely induced the manifestation of symptoms.** (Emphasis added) **Crum**, 738 F.2d 474, 16 BRBS 1 15(CRT); **Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). For example, in **Crum**, the United States Court of Appeals for the D.C. Circuit stated that aggravation of claimant's angina, a symptom of his underlying heart disease, as a result of stress and working conditions was compensable. **Crum**, 738 F.2d 474, 16 BRBS 115 (CRT). In **Crum**, claimant was held entitled to permanent disability benefits even though his symptoms abated when he was removed from the work environment. Following **Crum**, the Board has applied its analysis in **Marinelli, Cairns, and Care**. In **Obert**, the Board stated:

> If the work played any role in the manifestation of the disease, then the non-work-relatedness of the disease and the fact that the pains could have appeared anywhere are irrelevant; the entire resulting disability is compensable.

Obert, 23 BRBS at 160. In the present case, as Dr. Kolkin opined that stress could aggravate Claimant's pre-existing condition, and as there is no other evidence of record severing the connection between work-related stress and aggravation or exacerbation of the symptoms of Claimant's underlying condition, claimant is correct in arguing that employer has not presented substantial evidence

rebutting the Section 20(a) presumption.[6]

"Therefore, the case is remanded for the administrative law judge to render specific findings as to whether Claimant was exposed to stressful working conditions which could have aggravated his condition. If so, Section 20(a) is invoked. If the administrative law judge reaches the issue of rebuttal, we hold that Dr. Kolkin's opinion is insufficient to rebut the presumption that Claimant's condition has been aggravated by work-related stress; therefore, Claimant's injury is work-related as a matter of law. **Bath Iron Works Corp. v. Director, OWCP [Shorette]**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997); **Konno**, 28 BRBS 57. If claimant's condition is work-related, then the administrative law judge also must address the remaining disputed issues to determine whether claimant is entitled to benefits.

"Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration in accordance with this opinion.[7]

The record of the case was docketed at the Boston District on March 28, 2002 and this Administrative Law Judge issued an **ORDER** on April 2, 2002 and gave the parties thirty (30) days to resolve the matter voluntarily and to put an end to this litigation and, failing that, an additional thirty (30) days to file briefs in accordance with the Board's directions. (ALJ EX A) The parties requested an extension of time to file their briefs (EX A) and the extension was granted on May 30, 2002. (ALJ EX B) The Employer's brief was filed on June 28, 2002 (EX B) and Claimant's brief was

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[6]Dr. Bourne's report addressed only the alleged psychiatric injury and not the physical injury. In fact, Dr. Bourne specifically admitted he has no expertise to determine whether claimant's physical disorder had been aggravated by his employment. Emp. Ex. 29. Claimant does not challenge the administrative law judge's findings that he has no psychiatric disability and that any psychological condition is not work-related. Therefore, those findings are affirmed.

[7]In light of our decision, we need not address claimant's remaining contentions. Nevertheless, we reject claimant's assertion that the administrative law judge failed to give proper weight to the opinions of claimant's treating physicians. The opinions of treating physicians are entitled to special weight only when the claimant is faced with reasonable, competing, medical opinions as to how to best treat his work-related injury, in which case he, and not the employer or the administrative law judge, is to decide his course of treatment, **Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999), or, in the absence of substantial contrary evidence, **Pietrunti v. Director, OWCP**, 119 F.3d 1035,31 BRBS 84(CRT)(2d Cir. 1997).

filed July 8, 2002. The Employer was given ten (10) days to file a reply brief (ALJ EX C) and the Employer's reply was filed on July 30, 2002, at which time the record was closed. The claim is now ready for a decision on remand and, ultimately, for review by the U.S. Court of Appeals for the First Circuit, within whose jurisdiction this matter arises.[8]

According to the Employer, "the following issues have been resolved and cannot be revisited on remand.

"1. The Benefits Review Board affirmed [the] finding that Mr. Preston has no psychiatric disability and that any psychological condition is not work related. Decision and order BRB, page 5, note 3. Therefore, there are no psychiatric or psychological issues that need consideration on this remand.

"2. The Benefits Review Board held that if [I] find Mr. Preston's testimony credible and find that he has established a **prima facie** case of aggravation to his pre-existing physical condition due to a stressful work environment, then Dr. Kolkin's testimony is insufficient as a matter of law to rebut the Section 20(a) presumption. Under those circumstances, as a matter of law, Mr. Preston's injury is work-related. Decision and order BRB, page 6. Although recognizing that this issue is not before (me) on remand, the Employer believes that (my) original decision finding Dr. Kolkin's testimony sufficient to rebut the Section 20(a) presumption was correct. The Employer wishes to preserve this issue for appeal.

"3. Additionally, the Benefits Review Board rejected Mr. Preston's assertion that (I) failed to give proper weight to the opinions of his treating physicians. Decision and order BRB, page 8, note 4. Therefore, when deciding whether Mr. Preston established a **prima facie** case of aggravation to his pre-existing physical condition due to a stressful work environment, (I am) not required to give the opinions of Mr. Preston's treating physicians special weight.

According to the Employer's thesis,

"The following issues are before [this Administrative Law Judge] on remand.

"1. The Benefits Review Board has remanded this case to (me) so that [I] may render specific findings as to whether Mr. Preston was exposed to stressful work conditions that aggravated his condition. Decision and order BRB, page 6. It is settled law that credibility determinations and evaluations of all lay and medical

[8]In this regard, **see** footnote 1.

witnesses are solely within the province of the Administrative Law Judge. **See**, **Bath Iron Works Corp. v. Director, OWCP [Hutchins]**, Decision No. 00-1208 at page 16 (1st Cir. April 5, 2001); **Mijangos v. Avondale Shipyards, Inc**., 948 F.2d 941 (5th Cir. 1991). (I) have already determined that Mr. Preston is not credible, and have instead credited the testimony of Mr. Thibotout and Drs. Bourne and Kolkin. Decision and order ALJ, page 33-34. Therefore, as there is no new evidence, the Employer asks that [I] not overturn [my] previous determination of credibility and instead find that Mr. Preston was not exposed to stressful work conditions that aggravated his condition.

"2. In the event that [I] determine that Mr. Preston was exposed to stressful work conditions that could have aggravated his condition, the Benefits Review Board has determined that Dr. Kolkin's testimony is not sufficient as a matter of law to rebut the Section 20(a) presumption. As a result, Mr. Preston's injury would be work related. Again, the Employer disagrees respectfully with the Benefits Review Board analysis and wishes to preserve this issue for appeal. The next issue would be whether Mr. Preston provided timely notice to the Employer. The Employer argues that he has not and therefore his claim should be barred.

"3. Finally, if [I] should determine that Mr. Preston provided timely notice to the Employer, the last issue is whether the employee has established that he is entitled to disability benefits. The Employer argues that Mr. Preston has not satisfied his burden of proving disability and as a result, his claim should be denied.

"Mr. Preston alleges a work-related aggravation of a pre-existing neurological disorder, which he claims was significant enough to render that neurological disorder compensable. The alleged date of injury is November 1, 1997. The Claimant seeks temporary partial disability benefits from November 1, 1997 to August 27, 1998,[9] and temporary total disability benefits from August 28, 1998 to the present and continuing. The claim was filed on October 22, 1998 and was timely controverted on November 4, 1998. Before discussing the legal issues, we will summarize the factual evidence."

On the other hand, Claimant submits in his brief, "Michael Preston suffers from a genetic nervous disorder that causes him to have involuntary jerking and shaking motions of his head and arms. When he is under stress the involuntary jerking is worse. In spite of his disability, he worked as a rigger and crane operator at Bath Iron Works for twenty years. In his later years, he was subjected to constant name-calling ("Shake and Bake"), ridicule, and

[9]Claimant's post-hearing memoranda are silent on any claim for partial disability benefits. Thus, I assume he has waived such claim.

practical jokes designed to trigger shaking and jerking motions. During the last two to three years the harassment at work became progressively worse making his involuntary movement worse. He began to worry that the jerking motions would one day cause him to make a mistake that would seriously hurt or kill someone. He also developed alcoholism as a result of self-medicating himself to control the jerking. Finally, the harassment, worrying and worsening myoclonus caused his doctor put him out of work.

"In his original decision the Administrative Law Judge denied benefits. The case is now being considered on remand from the Benefits Review Board. The Claimant argues that he has established a **prima facie** case for benefits. He has suffered a harm, an increase in the shaking and involuntary movements of his non work-related myoclonus, and he was subjected to stressful working conditions, **i.e.**, ridicule because of his tremors, practical jokes and increasing concerns about safety, that were capable of causing the increased tremors. Neither the opinion of Dr. Kolkin, nor any other evidence in the record is substantial evidence that rebuts the presumption. Even if this court again holds that the presumption is rebutted the Claimant contends that the weight of the evidence supports the claim that his injury is work related, once it is understood the injury he claims is the worsening of his tremors by work stress," according to Claimant.

PRIOR PROCEEDINGS

"In the original decision the Administrative Law Judge found that the testimony of Dr. Seth Kolkin rebutted the presumption of compressibility in §20(a) [33 U.S.C.§920(a)] and after examining the evidence as a whole found that causation had not been established. The original decision appeared to assume that the harm the Claimant asserted as his injury was his familial myoclonus itself rather than the work place aggravation. The decision also made no specific findings concerning whether working conditions were stressful for Mr. Preston.

"In its decision dated January 15, 2002, the benefits review board reversed the Administrative Law Judges decision denying benefits to Michael Preston. Specifically, it held that the medical opinion of Dr. Seth Kolkin, on which the ALJ had relied to hold that the presumption was rebutted, was not sufficient because it actually supported causation. Dr. Kolkin had testified that stress could worsen the involuntary movements of Mr. Preston's familial myoclonus. The Board also reversed because of the judge's failure to make findings concerning whether the Claimant had introduced evidence establishing a **prima facie case**. The BRB remanded the case with instructions to the Administrative Law Judge to make findings concerning whether the Claimant had demonstrated that he had suffered a harm and had shown the existence of working conditions capable of causing that harm. The Board also held that aggravation

of a non work-related condition, regardless of whether the it is the symptoms or the underlying disease process that is made worse, can be an injury. The Board also pointed out that in evaluating the working conditions the issue is whether they were stressful for Michael Preston. Finally, the Board held that the testimony of Dr. Kolkin did not rebut the presumption because he agreed that stressful working conditions could worsen the involuntary movements of myoclonus," according to the Claimant.

The Findings of Fact and Conclusions of Law made in my January 2, 2001 **Decision and Order - Denying Benefits**, to the extent not disturbed by the Board, are incorporated herein by reference and as if stated **in extenso** and will be reiterated herein only as needed for clarity and to deal with the Board's directions.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, except as noted below, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that

"[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim

under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Harford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain

can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed

the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial evidence to negate the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his paramyclonus multiplex, resulted from working conditions at the Employer's shipyard. The BRB has already held, as a matter of law, that the Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment, once I conclude that Claimant has invoked the statutory presumption in his favor. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

SUMMARY OF THE EVIDENCE

Michael Preston ("Claimant") was 43 years old at the time of the hearing. He went to work at Bath Iron Works as a rigger on February 8, 1978 and continued to work in that job until he was forced to leave on August 28, 1998. As a rigger he worked underneath the cranes and was responsible for attaching large loads, such as pieces of machinery weighing up to 150 tons. At times he was required to go up in a cherry picker to attach a load to a crane. He typically worked as part of crews of six to eight people. In the last six or seven years he also worked as a substitute crane operator about half of the time; the other half he continued to work as a rigger. The cranes he operated are on tracks in the assembly building and are approximately 50 feet above the floor. (TR. 23-25, 46-48, 70-73, 76, 80-83; CX-6)

It is undisputed that Claimant suffers from a hereditary neurological disorder know as paramyoclonus multiplex, which causes involuntary rapid jerking motions of his head and hands. He was first diagnosed with the disease in 1972 when he was fifteen years old. He has never claimed that his underlying condition was work-related. He does, however, claim that harassment and constant stress at work made it worse to the point where he finally could not continue at BIW. When he first went to work at BIW in 1978 his symptoms were not significant. However, over time the frequency and severity of his jerking motions increased, according to Claimant.

The most convincing evidence that Claimant's involuntary movements became worse while he was at BIW came from his supervisor, Luke Thiboutot. Mr. Thiboutot testified at the hearing on behalf of the Employer. Mr. Thiboutot knew Michael throughout the 20 years he worked at BIW. He testified that Michael's condition did get worse:

> Q. And what is your observation as to whether that condition [jerking motions] was different at the end of his employment as opposed to the beginning?
>
> A. I would have to say it was probably worse at the end of his employment. (TR at 73-74)

Mr. Thiboutot also testified that toward the end, other employees questioned whether it was safe for Claimant to be rigging big loads and operating the crane. (TR at 93) On September 22, 1997, Claimant visited BIW's Industrial Health Department with a union official to report that co-workers were teasing him and had expressed concerns about whether he could safely do his job. (CX-l0; encounter form dated)

The medical evidence from his treating physicians also shows Claimant's condition progressed. When he was examined at the National Institutes of Health, the NIH doctors characterized his condition as "mild". When Dr. Boothby, a neurologist, examined him

in 1991, he noted his tremor and described it as “mild”. When Dr. Seascholz saw him in 1997, she described his tremor as “coarse and rapid”. Finally, when Dr. Carinci saw him in August and October of 1998, she described more involuntary movements of the upper body than had ever been described by prior doctors and characterizes it as “significant multifocal myoclonus on examination.” (TR 25-26, 51-53; CX-8, 10/18/72; CX-12, CX-13 office note of 10/23/97; CX-l4, report dated 8/28/98, CX-20 at 9)

Dr. Kolkin, who was hired by BIW to evaluate Claimant for this litigation, offered the only contrary evidence. He examined Claimant only once in 1999. He concluded that Claimant’s myoclonus had not progressed; he based his opinion solely on a comparison of his hand writing ten years ago and at his examination in 1999. He admitted that he had not known the Claimant over the past ten years, that little is known about the causes of myoclonus. He also knew of no research on the effects of long-term stress on the condition. (CX-20 at 5-9, 28-29)

Finally, Claimant consistently reported to his treating physicians, that his involuntary motions were getting worse. And he reported this long before there was any litigation pending. When Dr. Bourne, another BIW expert, examined him, he reported that his condition was 50% improved now that he was no longer working at the Yard, according to the Claimant, who also submits that all of the doctors, including Dr. Kolkin, agree that stress can temporarily exacerbate the symptoms of myoclonus. They agree that while under stress, Claimant’s jerking motions would be worse. Dr. Kolkin concluded that he could work in a “calm, supportive environment.” At his deposition he went on to say that a calm, supportive environment would be one where he was given some latitude and encouragement. When asked whether an environment where Claimant was ridiculed, called derogatory names and subjected to practical jokes designed to trigger his jerking motions was calm and supportive, he evaded the question at length, finally answering lamely that Claimant had probably been subjected to that treatment all his life, according to Claimant. (CX-l2, Letter of Dr. Kolkin 11/22/99; CX-15; CX-20, 36-39)

Claimant further submits that the work environment at Bath Iron Works was stressful for him in a number of ways. Loud noises that startled him would cause him to jump and suffer increased involuntary jerking. These noises could be those that are normal in a shipyard or coworkers playing practical jokes such as hitting him on his hard hat. The practical jokes and name-calling were a significant source of stress. He was routinely called “Shake and Bake.” Even his supervisor, Luke Thiboutot, admitted calling him by that name. His report of the incident is very revealing:

> “...He [a shipfitter] came in and asked me for a lift down the one door and I said Mike′s down there.... He

said Mike who? And I said Mike Preston. He said you mean the guy in the coveralls, and I said no, Shake and Bake." (TR at 87)

Although Mr. Thiboutot later apologized to Claimant, the incident shows that Claimant was better known in the Yard by a derogatory nickname that made fun of his disability than by his name. (TR at 25-34; 63-65)

Claimant also submits that he also suffered a great deal of stress because of his growing concerns about his ability to do his job safely. Both rigging and operating the cranes involved tremendous potential risk to himself and his co-workers. Any mistake lifting a 150-ton piece of machinery could easily be fatal. Things got worse right before he left. He panicked while up on a ladder and had to be lifted down in a cherry picker. He got to the point where he could no longer operate the Conda lift. Other workers started to question whether he could safely rig loads or operate the crane. On September 22, 1997, he went to the Industrial Health Department to express his concerns about safety and to complain about the name-calling. Mr. Thiboutot told them that he relied on Claimant to judge whether he could work safely with his condition. (TR at 34, 5 1-53, 74-79, 93; CX-l0; encounter form 9/22/97)

Claimant left BIW because the combined effect of all this stress had made his myoclonus much worse. Before he left work, he needed to take more and more time off to get his nerves under control so that he could do his job when he did work. He also felt that he could no longer be sure that he could do his job safely. His treating physician, Dr. Carinci, took him out of work because of the effect that the stress was having on his myoclonus. The wisdom of that decision has been borne out by the fact that, after being out of the yard for four (4) years, he reported substantial improvement. (TR at 29-34; CX-l4, letter dated 8/28/98).

On the other hand, the Employer submits, as alternate arguments, that Claimant has not established a **prima facie** claim of a work-related injury or, if he has, that the Employer has rebutted by substantial evidence the Section 20(a) statutory presumption in Claimant's favor.[10]

This Administrative Law Judge, having been directed by the Board to reconsider the totality of this closed record on the nature and extent of the Section 20(a) presumption, is now constrained to find and conclude that Claimant has established a

[10]This second prong of the Employer's defense can not be revisited by this Administrative Law Judge because the Board has already ruled that Dr. Kolkin's opinion, as a matter of law, does not rebut the presumption and that ruling is the "Law of the Case."

prima facie claim that his chronic and hereditary neurological disorder, medically diagnosed as paramyclonus multiplex, was aggravated, accelerated and exacerbated by the stressful working conditions to which he was subjected in the course of his maritime employment at the Employer's shipyard, as shall now be further discussed.

As already noted above, in order to invoke the presumption in Section 20(a) the Claimant must introduce evidence that establishes a **prima facie** case for compensation. There are two elements that he must show: that he has suffered harm and that he was exposed to working conditions that could have caused the harm. **Bath Iron Works Corp. v. Brown**, 194 F.3d 1, 33 BRBS 162 (1st Cir. 1999). In **Brown**, the First Circuit Court of Appeals upheld an award of hearing loss benefits based on the presumption alone. Mr. Brown had introduced evidence that he had a noise induced hearing loss and that he had been exposed to high levels of noise while working at the main shipyard, a covered site. The court held that this evidence established a **prima facie** case; since there was no rebuttal evidence, he was awarded benefits. **See also Lacey v. Four Corners Pipe Line**, 17 BRBS 139 (1985) (ALJ who had denied benefits, was instructed on remand to make specific findings on both elements of the **prima facie** case where the employee claimed her hepatitis was aggravated by exposure to toxic chemicals at work.) In this case, as noted above, the Benefits Review Board has specifically directed this Administrative Law Judge to make findings on both elements. (Decision at 5)

Claimant submits that the increase in his involuntary movements constitutes a work-related injury. I now agree with Claimant's thesis because it is well established that the harm or injury, which must be established to make a **prima facie** case, can be the aggravation of a non work-related condition. It does not matter whether the aggravation is an increase in the symptoms of the underlying non work-related condition or something that actually alters the disease process. In **Marinelli v. American Stevedoring, Ltd.,** 34 BRBS 112 (2000), **aff'd**, 248 F.3d 54, 35 BRBS 41,49 (1990) (2nd Cir. 2001) the employee suffered from underlying heart disease, depression and anxiety. His job as a Shop Steward, which required him to mediate disputes and enforce safety rules subjected him to stress, worsened the symptoms of his underlying disease and finally forced him to leave his job. Both the Benefits Review Board and the Court of Appeals upheld the award of benefits to him. The Court of Appeals, in a most significant decision dealing with a novel status issue, held that that employee had properly invoked the presumption in Section 20(a) by showing that the symptoms of his underlying non work-related conditions were made worse by stress at work. The First Circuit Court of Appeals reached a similar conclusion where the employee claimed that standing on concrete floors at Bath Iron Works aggravated the symptoms of his varicose veins to the point where he was temporarily forced out of work. **Gardner v. Director, OWCP**, 640 F.

2d 1385, 13 BRBS 101 (1st Cir. 1981). **See also Crum v. General Adjustment Bureau**, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984) (Chest pains of angina that worsened at work, but abated away from work were a harm for the purposes of showing a prima **facie case**.); **Obert v. John T. Clark & Son**, 23 BRB7 157 (1990).

In view of the pertinent holdings of **Marinelli, Gardner and Crum**, and after being prompted by the Board, I now find and conclude that the Mr. Preston has introduced ample evidence of harm to invoke the presumption. First he testified that his involuntary movements, shaking and jerking of his head and arms, increased over the years especially during the last five years he worked at BIW. This means that most of the increase occurred before the alleged date of injury of November 1, 1997,[11] which was less than a year before he was forced to leave BIW at the end of August 1998. Mr. Thiboutot, his supervisor who appeared as a witness for Bath Iron Works, credibly corroborated Claimant's testimony by stating that Claimant's tremors had gotten steadily worse over the twenty (20) years he had known Claimant, but especially in the last several years. The contemporaneous records of his treating physicians, which were generated at a time when no litigation was pending, also corroborated Claimant's testimony. Dr. Carinci who finally put him out of work in particular documented that Claimant was in bad shape because of the worsening of his symptoms, and I so find and conclude.

Accordingly, in view of the foregoing and having been prompted by the Board to do so, I now find and conclude that Claimant has established the first prong of the **prima facie** case, **i.e.**, the existence of bodily harm.

With reference to the second prong, Claimant submits that he has shown that his working conditions were stressful for him.

As already noted above, the Benefits Review Board has explicitly directed this Administrative Law Judge to make findings on remand concerning whether Claimant was subjected to stressful working conditions that were capable of worsening his involuntary movements. The Board has emphasized that the issue is whether the conditions were stressful for him, because an employer takes each employee as it finds them. (Decision at 5) In **Konno v. Young Brothers, Ltd**. 28 BRBS 57, 61(1994) the Board upheld an award of benefits, where a widow claimed that her husband's suicide was

[11]Dates of injury, in cases such as this where the Claimant asserts that ongoing conditions cause the injury, are often arbitrarily assigned by BIW when the Claimant first reports the problem. This is the case with this date of injury. BIW Industrial Health Department records show that Mr. Preston expressed concerns about safety and complained about teasing on September 22, 1997.

caused by stressful events at work. The events included (1) a supervisor who berated him for being three minutes late, (2) went to his home to hand deliver a paycheck when he was out sick and (3) a criminal investigation of stealing by some of his co-workers, although he was not a target of the investigation. He was apparently very disturbed by the necessity of testifying against some co-workers before a grand jury although that occurred outside of work. The Board found that the evidence showed that these events were stressful for Konno and that therefore his widow had demonstrated the second prong of the **prima facie** case and was entitled to benefits.

In the case at bar, the sole issue before me is whether Claimant has shown that the stressful events he alleges at work were stressful for him. He contends that the ridicule to which he was subjected was both objectively and subjectively offensive and stressful. There were three basic situations that Claimant found stressful: name-calling that ridiculed him for his disability, practical jokes designed to make his head and arms shake worse than usual and his growing concerns as to whether he could do his job safely.

This closed record now leads ineluctably to the conclusion that Claimant's testimony and that of his supervisor establish that he was routinely called "Shake and Bake." This nickname was so pervasive that at least some employees did not know Claimant by his real name. Even his supervisor who apparently respected him referred to him by that name. On its face the nickname is a derogatory reference to his disability. His supervisor Mr. Thiboutot apparently recognized it was offensive and hurtful as well, because he apologized to Claimant for using it. Claimant also testified to several practical jokes that were played on him to trigger his head and arm shaking. Finally, Claimant testified that as his tremors got worse he began to fear that he could no longer operate the crane properly. Mr. Thiboutot supported Claimant's safety concerns when he again credibly testified that he left it up to Claimant to decide when he was no longer safe to operate a crane. He had known Claimant for twenty (20) years and relied on him to determine whether his myoclonus made him unsafe. This Administrative Law Judge, who saw and heard Claimant for about an hour, now defers to the judgment of his Supervisor who considered Claimant's concerns about safety credible and relied on his judgement.

The stressful situations to which Claimant was subjected were objectively far worse than the stress that was the basis for awarding benefits in the **Marinelli** and **Konno** cases, because in those cases the stressful events were not systematic and intentional ridicule for those employees' underlying disability or condition. Mr. Konno found it stressful that his employer addressed him angrily about being 3 minutes late after an excellent

work history of twenty (20) years. Claimant, who also had a good work history for twenty (20) years, was not criticized for any deficiency in his work. He was, however, subjected to **ad hominum** and dehumanizing remarks about a genetic condition he could not do anything to change. Claimant does not allege, as Marinelli did, that his regular duties were the only source of stress. Claimant's stress comes from the fact that even though his job performance was good, he was subjected to constant name calling and pranks, solely because of his disability. Surely, ridicule for an inherited condition would make the usual stress of a job worse for anyone, and I now so find and conclude.

The Benefits Review Board in its remand decision refers to contrary evidence that the Employer introduced: the fact that Claimant was a good employee and that teasing was pervasive at Bath Iron Works. (Decision at 4) However, this evidence does not establish that the working conditions were not stressful for Claimant. First, the fact that Claimant was a good employee only made the ridicule of his disability more offensive. He was an employee who instead of getting respect for his skills operating a crane, was treated by his coworkers as nothing more than his disability, "Shake and Bake." The fact that his Supervisor considered him a good worker lends credibility to his testimony that he found the teasing and practical jokes stressful, and I so find and conclude. The fact that teasing is common at the shipyard misses the point; the teasing directed at Claimant was an attack on his disability, which is different from ordinary teasing or horseplay. The Employer did not introduce evidence that ridiculing people for their disabilities is common practice at the shipyard and it is unlikely that it will do so because of the obvious risk of liability for discriminating against people with disabilities, especially in this "politically correct" time. Finally, I also note in passing that while the BRB pointed to the fact that Claimant only reported a problem to his Supervisor on one occasion, this is actually incorrect because Claimant had also reported it to the Industrial Health Department the previous Fall, with a Union representative present.

The Benefits Review Board indicated that it was also concerned that the evidence was unclear as to whether the stressful events occurred before or after the date of injury. Claimant clearly testified that the pranks and teasing had been going on for some years and were getting worse in the last couple of years before he left. Since he left the shipyard on August 28, 1998, ten months after the original date of injury it is clear the pattern of teasing, ridicule and bad jokes was ongoing before the date of injury. Although the record does not reflect the exact dates for some of the particular incidents to which Claimant testified, each one of them could have been a separate date of injury. The date of injury, November 1, 1997, is the date BIW used to identify the ongoing problem of stress. Moreover, the medical encounter form

dated September 22, 1997 makes it clear that Claimant was bothered by concerns about safety and the fact that co-workers often made fun of him, all of which incidents occurred before his date of injury, and I so find and conclude.

> According to the Employer's September 22, 1997 form: he is working in the Assembly Building, climbing about the units and often involved with suspended lifts. He states his co-workers are concerned about their safety and often make fun of him" (CX-10)

This Administrative Law Judge, in now concluding that Claimant's stressful working conditions aggravated, accelerated and exacerbated his pre-existing and chronic neurological disorder, finds most significant the opinion of Dr. Standaert, the Employer's medical expert.

At the Massachusetts General Hospital (MGH), the Claimant was examined by a specialist, Dr. Standaert, who wrote to Attorney Marcia Cleveland on February 18, 1999 in response to her request for further information. **See** EX 25, Bates stamp page 519. In that letter, Dr. Standaert stated as follows:

> I believe that the fundamental cause of his myoclonus is an inborn genetic condition, which has been present throughout his life. With regard to the questions you pose in your letter of February 8th, 1999, I believe it is true that a stressful environment can cause a temporary worsening of the twitching and shaking symptoms related to the myoclonus. I would not expect such a worsening to be permanent. Rather, when the stress was removed, I would expect that the symptoms would return to their previous state. **See** EX 25, Bates stamp page 519.

While Dr. Standaert went on to state that he did not go through with Claimant the specific details of his job and did not feel he was in a position to comment on the character of the work environment (**Id.**), the fact remains that the doctor's opinion supports the establishment of Claimant's **prima facie** claim, and I now so find and conclude.

Dr. Kolkin's testimony need not be mentioned herein as the Board has already ruled, as a matter of law, that the doctor's testimony does not rebut but actually **supports** the statutory presumption invoked by the Claimant. That ruling is the "Law of the Case" and may not be revisited by this Administrative Law Judge. However, the Board has the discretion to modify or vacate that ruling and, apparently, the U.S. Court of Appeals for the First Circuit will be given the opportunity to review that ruling.

I also find noteworthy additional medical records from the

MGH. In the records from the MGH is a record from a psychologist indicating that Claimant may suffer from post-traumatic stress disorder due to harassment at work. Those medical records were in the context of an admission to the Detox Unit in August of 1999, approximately a year after having last worked at Bath Iron Works Corporation. Mr. Preston was admitted to the Spaulding Detox Unit in the context of drinking eighteen to twenty beers per night. This incident also shortly followed the unfortunate death of his mother. While the medical note indicating a diagnosis of post-traumatic stress disorder does not describe the nature of the stress and does not expound at all on what it was, I find and conclude that it is obvious that the doctor is referring to the cumulative effect of his work-related and personal problems. However, the Employer was dissatisfied with that report and, accordingly, the Employer had Claimant examined by Dr. David Bourne to address this issue. In his report of June 22, 2000, Dr. Bourne reviewed all of the medical records and did an in depth examination of Mr. Preston. The history that he took was clearly sympathetic to Claimant and complete in terms of his recitation of the types of alleged stressors that existed at work. Dr. Bourne also took a history of extensive substance abuse including alcohol, marijuana and cocaine. Dr. Bourne's conclusion was that

> Although it is reasonable to believe that Mr. Preston reacted to comments (in the work place) by feeling hurt, I think that the psychological problems which he had were caused by his movement disorder and the alcoholism. The alcoholism appears to have been, at least significantly, an attempt to self-medicate his movement disorder...I do not think it reasonable to opine that those remarks caused any psychological condition. **It is the movement disorder which has caused his psychological condition**, which I have diagnosed as a chronic adjustment disorder.

As noted above, the Board has noted that Dr. Bourne's opinion is not relevant to the question of whether his increased tremors are work-related, and I so find and conclude.

I also note that the Board, in footnote 2, states as follows: "Claimant's myoclonus tremors decreased with alcohol intake; thus, he became an alcoholic in his attempt to self-medicate. Claimant has been treated for alcoholism. **See Emp. Ex. 27**." Thus, in the Board's reasoning, perhaps **obiter dicta**, Claimant's alcoholism may constitute a work-related injury. However, that issue is not present herein but my successor may face that issue in the future.

As is noted above, the Benefits Review Board explicitly held, as a matter of law, that the testimony of Dr. Kolkin is not sufficient to rebut the presumption, and that, therefore, Mr. Preston is entitled to benefits as a matter of law if the presumption is properly invoked (BRB Decision at 6). The Board also

held, as a matter of law, that Dr. Bourne's opinion is not relevant to the question of whether Claimant's increased tremors are work-related.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987);

Geisler v. Columbia Asbestos, Inc., 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

While the Employer correctly points out that no new evidence has been presented herein, I have been directed by the Board to reconsider the totality of this record in accordance with their instructions. I have done so and I now find and conclude that Claimant has established a **prima facie** claim that his chronic and pre-existing paramyclonus multiplex has been aggravated, accelerated and exacerbated by the stressful working conditions to which he was subjected at the Employer's shipyard, that such aggravation constitutes a new and discrete work-related injury and that the date of injury is September 22, 1997, at which time the Claimant and his union representative discussed with the Employer's agents his problems.

The evidence relating to this issue has already been extensively summarized and discussed above and there is no need to restate this discussion at this point, and I so find and conclude.

The Employer posits that Claimant failed to give timely notice to the Employer of his work-related injury, and this issue will now be discussed.

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15

BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

Although the Employer did not receive written notice of the Claimant's injury or occupational illness as required by Sections 12(a) and (b), **i.e.**, by the filing of the Form LS-201, the claim is not barred because the Employer had knowledge of Claimant's work-related problems or has offered no persuasive evidence to establish it was prejudiced by the lack of written notice, as further discussed below. **Sheek v. General Dynamics Corporation**, 18 BRBS 151 (1986) (**Decision and Order on Reconsideration**), **modifying** 18 BRBS 1 (1985); **Derocher v. Crescent Wharf & Warehouse**, 17 BRBS 249 (1985); **Dolowich v. West Side Iron Works**, 17 BRBS 197 (1985). **See also** Section 12(d)(3)(ii) of the Amended Act.

This Administrative Law Judge is presented with the issue of whether Claimant's failure to provide timely notice as required by Section 12(a) is excused under Section 12(d) where the employer knows that claimant has sustained a work-related accident which has resulted in injury but does not have knowledge of the particular bodily injury for which compensation is being sought. Section 12(d) specifies the circumstances when failure to give notice under Section 12(a) will not bar a claim. Under Section 12(d) as amended in 1984, 33 U.S.C. §912(d) (Supp. IV 1986), which is applicable to this case, the failure to provide timely written notice will not bar the claim if claimant shows **either** that employer had knowledge during the filing period (subsection 12(d)(1)) **or** that employer was not prejudiced by the failure to give timely notice (subsection 12(d)(2)). **See Sheek v. General Dynamics Corp.**, 18 BRBS 151 (1986), **modifying Sheek v. General Dynamics Corp.**, 18 BRBS 1 (1985).

The Board and the Appellate Courts generally require that in order for the employer to be charged with imputed knowledge under Section 12(d), employer must have knowledge not only of the fact of claimant's injury but also of the work-relatedness of that injury. **See Sun Shipbuilding & Dry Dock Co. v. Walker**, 684 F.2d 266 (3d Cir. 1982), **aff'g** 14 BRBS 132 (1981), **cert. denied**, 459 U.S. 1039 (1982); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983). The Board and the Courts have also recognized that application of the Section 12(d) knowledge exception is precluded where, as here, claimant has previously certified on his group health insurance form that his injury was not work-related. **See Janusziewicz v. Sun Shipbuilding & Dry Dock Co.**, 677 F.2d 286, 291, 14 BRBS 705, 712 (3d Cir. 1982); **Sun Shipbuilding & Dry Dock Co. v. Walker**, 590 F.2d 73 (3d Cir. 1978), **rev'g** 7 BRBS 134 (1977); **Sheek v. General Dynamics Corp.**, 18 BRBS

1 (1985), (**Decision and Order on Reconsideration**), 18 BRBS 151 (1986). **Cf. Pilkington v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 119 (1981).

Pursuant to Section 12(a), a claimant has one (1) year from the date of awareness to provide notice of the injury or death in a claim such as this one involving an occupational disease. **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). Section 12(d) excuses a claimant's failure to give timely notice if employer had actual knowledge of the injury or death; employer was not prejudiced; or for some reason found satisfactory by this Administrative Law Judge could not be timely given. **Sheek v. General Dynamics Corp.**, 18 BRBS 151 (1986), **modifying Sheek v. General Dynamics Corp.**, 18 BRBS 1 (1985). Contrary to Employer's contention, Employer bears the burden of proving by substantial evidence that it has been unable to investigate effectively some aspect of the claim by reason of the Claimant's failure to provide timely notice as required by Section 12. **Strachan Shipping Co. v. Davis**, 561 F.2d 968, 8 BRBS 161 (5th Cir. 1978), **rev'g**, 2 BRBS 272 (1975); **Williams v. Nicole Enterprises**, 21 BRBS 164 (1988). Although Employer contends that it would be "highly inappropriate" to place this burden upon it, its argument overlooks the fact that Employer is in a far better position than Claimant to know the manner in which it has been prejudiced by Claimant's failure to provide timely notice.

The Employer submits that Claimant failed to give notice of his injury to his Employer until the claim was filed. This date is well beyond the one year time period available to Mr. Preston and therefore his claim should be denied.

According to the Employer, Claimant was required to give notice of his injury within thirty days of the date of injury itself. His first disability in this case was in September of 1997 when the first report was made to BIW First Aid. The first aid note of September 22, 1997 clearly reflects the history provided by Mr. Preston and there is no allegation of a work component to his disability. Notice of an alleged work injury was not given until the claim itself was filed, which was in October of 1998. This is clearly beyond the 30-day notice requirement for a traumatic injury, and beyond the one-year notice requirement for a gradual injury or occupational disease. The Claimant attempts to circumvent this by conveniently alleging a date of injury of November 1, 1997. That date has no factual significance and was clearly chosen only because it is within one year of the date of notice. September 22nd is the correct date of injury and this claim should be barred because of Mr. Preston's failure to give timely notice, according to the Employer's thesis.

As noted above, the Employer submits that Claimant did not give notice of his alleged work injury until the claim itself was filed, which the Employer argues was beyond the one-year time

period available to Claimant. In the event that this Court agrees with the Employer, Claimant must rely on inferences to support any allegation that the Employer was given notice of his injury before the filing date. This case is analogous to **Stark v. Washington Star Co.**, 833 F.2d 1025 (D.C. Cir. 1987). In **Stark**, the D.C. Circuit found that the newspaper's adoption of a policy requiring protective breathing apparatus in the pressroom, coupled with its knowledge of the pressman's lung ailment, did not support an inference that the newspaper had notice of the work-relatedness of the pressman's ailment. **Id**. Similarly, the one incident where Mr. Thiboutot referred to Claimant as Shake and Bake does not support an inference that the Employer was given notice that Claimant's work environment was stressful. Nor did the visits to the first aid department, where Claimant never spoke of work related stress, with the exception of one time related to his drinking, support the inference that the Employer was put on notice that Claimant's work environment was stressful. Accordingly, Mr. Preston's claim should be denied, according to the Employer.

I disagree with the Employer for the following reasons. Initially, I note that my prior decision clearly reflects, on page four thereof, that the parties stipulated that "Claimant gave the Employer notice of the injury (on) or about October 23, 1998." I also note that "Claimant alleges that he suffered an injury on November 1, 1997 in the course and scope of his employment." (**Id.**)

As noted, the Employer points to September 22, 1997, and not November 1, 1997, as the key date herein. Let us take a look at exactly what happened when Claimant and his union representative went to the Employer's Yard Infirmary on September 22, 1997. In the medical encounter form (CX 10) the following entry was made:

Subjective: Mr. Preston is a 40 year old yard rigger presenting at his request with a union representative to discuss his tremors and indicating he is feeling uncomfortable due to coworker pressure and a worsening of his condition. Michael gives a >20 year history of a condition he terms "Parellax Clonus Multiplex" which I am not familiar with. He states he has family members also with this. He has fine tremors made worse when under stress. Currently he is working in the Assembly Building, climbing about the units and often involved with suspended lifts. He states his coworkers are concerned about their safety and often make fun of him. He has not been medically evaluated for this condition for many years. (Emphasis added)

Objective: Tremors are present.

Assessment: Unknown

Claimant has also been examined by Dr. Douglas Farrago for various personal illnesses and the doctor's records are in evidence as EX 27. Noteworthy is the doctor's referral back to Dr. Stephanie

Carinci for further evaluation of Claimant's neurological condition. (**Id.**)

Dr. Carinci sent the following letter to Dr. Farrago on August 28, 1998 (EX 24):

Thank you very much for sending Michael Preston over to see me. As you know, he has a multitude of neurologic issues and a fascinating movement disorder that you have asked me to evaluate.

Michael was in his normal state of health until approximately the age of 15. He presented with some shaking and twitching in his hands to his local doctor and eventually ended up in Bethesda, Maryland at the Institutes of Health for a full neurologic evaluation along with other family members. He, his father, and his sister were diagnosed with "palax clonus multiplex". He was told at that time that his symptoms would likely remain stable. Unfortunately, he has progressed over the past 10 years and feels that his symptoms have doubled in the last five years. He has rather constant multifocal twitching and a few choreiform movements of the neck as well as his upper trunk and limbs. He has been very depressed about this issue and is having a lot of work-related difficulties. He does not recall the extent of his work, but does recall having a muscle biopsy and an EMG. Unfortunately, the social stigmata of the movement disorder helps further overuse of alcohol and Mr. Preston became a full-blown alcoholic. He has stopped drinking two months ago and has joined AA. He did find that the alcohol helped suppress some of the myoclonic movements. **He now feels that he is having some balance troubles, and since he operates a crane at Bath Iron Works, this is problematic. He has had a few mishaps at work and is becoming increasingly concerned about precipitating an accident. He is no longer able to stand on a ladder or do work in any degree of height. He has no sensory symptoms, Mr. Preston has had quite a time emotionally dealing with his movement disorder. He has been constantly harassed at work and is feeling like the work environment is becoming unsafe at this point. He is interested in pursuing a possible other job option.** His neurologic condition is also compounded by depression and at times he even admits to feeling suicidal. He did see Dr. Maria Rousso-Appel for psychiatric care on one occasion, but did not get along with her. He has seen other neurologist in the past, most recently Dr. Seashaltz (EX 23) in Portland, but did not wish to followup with her, either. (Emphasis added)

After the neurological examination, Dr. Carinci concluded as follows (EX 24):

IMPRESSION:

1. Probable myoclonus multiplex, Mr. Preston feels that the Neurontin and Propranolol are marginally helpful and prefers to stay on them. **I do feel that he is having a lot of movement**

disorder problems that prohibit safe operation of a crane at work. I would like to take him out of work immediately and make plans for disability or perhaps another type of job. I very much want him to be seen at the movement disorder clinic at Mass. General for further evaluation to see if perhaps there is a surgical intervention that may be of value to him...

Doug, thanks again for sending Mr. Preston over to see me. He has a fascinating rare neurologic condition and I am delighted to be involved in his care, according to the doctor.

Dr. Carinci also sent the following letter to Dr. Douglas Cole at the Massachusetts General Hospital in Boston (EX 24):

Thank you in advance for evaluating Michael Preston. He is a 41-year-old male who presented to my office with a diagnosis of "palax clonus myoclonus". I did find him to have significant multifocal myoclonus on examination, **but am not aware of the above condition, as apparently previously diagnosed at the Mayo Clinic**. I would very much appreciate your assessment in this regard, not only in terms of confirming his diagnosis, but also in terms of treatment options. I look forward to hearing from you. (Emphasis added)

As already noted above, Dr. David G. Standaert, M.D., Ph.D., (of the Mass. General Hospital) states as follows in his January 9, 1999 report (EX 25):

CLINICAL HISTORY: Mr. Preston is a 41-year-old man right-handed referred for evaluation of myoclonus. He reports that this problem has been present nearly all of his life. As a child he had great difficulty with handwriting. At the age of 13, he started to develop shaking of his neck and hands. In 1973, he and his sister were sent to the National Institutes of Health in Washington for evaluation of this problem. They underwent a variety of diagnostic tests including a muscle biopsy, and EMG, and a lumbar puncture and were told that they had myoclonus.

The problem was relatively mild for a number of years. In 1978 he started working as a crane operator and found that the movements interfered with his ability to control the crane and were often worsened with stress. Nevertheless, he managed to continue this career until about 1-2 years ago when the movements became so severe he was forced to leave on disability.

He says in the last 5-6 years there has been a definite worsening of his symptoms with increased difficulty with shaking, problems with balance when walking, and unsteadiness of speech. He finds that the symptoms are often aggravated by even small amounts of caffeine but are improved by exercise. He is particularly troubled by the movements of the head and neck which are present nearly continuously. He reports that his father had a condition which he believe nearly identical. He died about 10 years ago at the age of

62 of liver disease. He also has a sister who lives in Wisconsin with a very similar condition. There are 7 other siblings who are apparently not affected. However, 1 niece, who is 12 years old, also appears to have the same condition.

As far as treatment, he did observe that alcohol tended to improve the symptoms. However, he developed difficulty with overuse and for a time was a member of Alcoholics Anonymous. He now drinks only rarely. He finds that an occasional dose of Valium 5 mg is helpful to calm the shakes, although it does make him a bit sleepy. He was treated for a while with Propranolol which was also helpful but produced dizziness when standing, and he had a trial of Neurontin which was of no benefit...

Dr. Standaert concluded as follows (**Id.**):

IMPRESSION: Familial essential myoclonus. The family history seems fairly clear-cut, although it would be of interest to examine the other living affected family members. The myoclonus is multifocal but seems to involve most prominently the head and neck and the upper limbs. **It does appear to be stimulus sensitive** and his history suggests that it is also alcohol responsive as well. (Emphasis added)

We discussed several alternatives for treatment. The 2 most useful medications are likely to be Klonopin and Baclofen. We decided I would take a trial of Baclofen beginning with 5 mg. B.i.d. He will call me in 1 week to report on his progress. I advised him this medication should cause some sleepiness, and he should not operate heavy machinery or engage in other hazardous tasks while we undertake this medication trial. I also recommended that he speak with Dr. Jennifer Friedman who is interested in investigating further the genetic aspects of this situation and obtaining additional family history.

Finally, on review of his MRI, no abnormality of the brain was noted, but he does have very extensive disease of the sinuses bilaterally, and I recommended that further evaluation of this problem was probably warranted. He will return her in about 2-3 months, according to the doctor.

Dr. Standaert sent the following letter to Claimant's attorney on February 18, 1999 (CX 15):

I am writing in response to your request for further information on Michael J. Preston, Massachusetts General Hospital number 365-59-38. As you know, I have met Mr. Preston on only one occasion, the 7th of January, 1999, and our records indicate your office has received a copy of the notes from that visit.

I believe that the fundamental cause of his Myoclonus is an inborn genetic condition which has been present throughout his life. With

regard to the questions you posed in your letter of February 8th, 1999, **I believe it is true that a stressful environment can cause a temporary worsening of the twitching and shaking symptoms related to the myoclonus. I would not expect such a worsening to be permanent. Rather, when the stress was removed, I would expect that the symptoms would return to their previous state.** (Emphasis added)

As for the question regarding the nature of Mr. Preston's work environment, we did not discuss this in any detail, and I do not feel that I am in a position to comment on the character of his working environment at this point.

I do agree, however, that the presence of the myoclonic symptoms would make it hazardous to perform some tasks which might be required in a shipyard environment, according to the doctor. (Emphasis added)

Dr. Carinci continued to see Claimant as needed for his "right brachial plexus injury" and his "paroxysmal multifocal myoclonus." (CX 14)

Dr. Standaert and Dr. Jennifer Friedman issued the following statement on July 14, 1999 (CX 15):

To whom it may concern:

I am writing this letter in support of the claim by Mr. Michael Preston of disability under the **Americans With Disabilities Act**.

Mr. Preston suffers from a disorder termed familial essential myoclonus. This is an inherited disease which affects multiple members of his family. This condition causes intermittent, at times, severe, jerking movements of various parts of the body. These abnormal movements interfere with Mr. Preston's ability to maintain a sustained posture and to perform major life activities. **The disability is lifelong, though the symptoms may vary in intensity from time to time, and may be exacerbated by emotional or physical stress.** (Emphasis added)

Mr. Preston's symptoms involve primarily his head, neck, and arms, though at times, his speech and gait have been affected. His symptoms substantially limit his ability to perform manual tasks with his hands such as writing, and lifting **and have made it impossible for him to control the heavy machinery necessary on his previous job as a crane operator, according to the doctors.** (Emphasis added)

As of August 9, 1999 Dr. Friedman stated as follow (CX 15):

To Whom It May Concern:

Mr. Michael Preston suffers from heredity essential myoclonus. **This is a neurologic disorder, which is greatly exacerbated by stress.** Mr. Preston has found that his dog serves a calming effect and reduces his stress and thus, improves his movement disorder. Please feel free to call me with any questions, according to the doctor. (Emphasis added)

Thus, as can be seen as a result of that summary of pertinent medical evidence, the Employer had actual knowledge, as of September 22, 1997, 1) that Claimant and his union representative met with employees of the Employer, (2) that the purpose of that meeting was "to discuss his tremors" and he indicated that "he is feeling uncomfortable due to co-worker pressure and a worsening of his condition," (3) that these tremors are "made worse when under stress," (4) that "his coworkers are concerned about their safety and often make fun of him" and (5) that the Employer's physician was not familiar with the medical term for the tremors as reported by the Claimant," Parellax Clonus Multiplex" (sic).

Thus, as of that date, the Employer had sufficient knowledge to suspect that Claimant's neurological disorder was affecting his ability to work, that "he is feeling uncomfortable due to co-worker pressure," **i.e.**, the Employer's euphemistic term to refer to the teasing, taunts and ridicule from his co-workers and that his co-workers "often make fun of him." It is well to keep in mind that these medical encounter forms, just like any other medical report, are strictly narrative and do not discuss causation unless the author is asked to opine on the causation issue.

Accordingly, as of that date, the Employer had sufficient information to suspect a causal relationship between the "coworker pressure," their concerns about their safety, the taunts, teasing and ridicule of the Claimant and his maritime employment. The Employer was also obligated to file the appropriate injury report, **i.e.**, Form LS-202, to protect its interest and to avoid any tolling of the filing requirements of the Act. In the case at bar, the record reflects that the Employer filed Form LS-215 on or about November 4, 1998. (EX 3)

However, in the event that reviewing authorities should hold, as a matter of law, that the Employer did not possess sufficient knowledge as of that date on the possible causal relationship, I would also find that, as of September 22, 1997, there was no definitive opinion on the causal relationship between Claimant's paramyclonus multiplex and the stressful working conditions at the shipyard and such opinion was not expressed until the August 28, 1998 letter from Dr. Carinci to Dr. Farrago (EX 24) wherein the doctor opined that Claimant "is having a lot of movement disorder problems that prohibit safe operation of a crane at work," the doctor concluding, "**I would like to take him out of work immediately and make plans for disability or perhaps another type of job.**" (Emphasis added)

Thus, in view of the foregoing and as alternate grounds for finding timely notice, I also find and conclude that Claimant's neurologic disorder did not have an adverse effect on his ability to work because Dr. Carinci was the first to discuss that disorder and Claimant's employment, and that date is August 28, 1998.

Likewise, as of January 9, 1999, Dr. Standaert "agreed that the presence of the myoclonic symptoms would make it hazardous to perform some tasks which might be required in a shipyard environment." (CX 15)

As is noted above, Claimant finally had to stop working on August 27, 1998 due to the cumulative effect of his neurologic disorder and the stressful working conditions. Thus, it was on that date that Claimant's disorder, **i.e.**, his work-related injury, had an adverse effect upon his maritime employment, and I so find and conclude.

Accordingly, Claimant, who gave the Employer notice of his work-related injury on or about October 23, 1998, has satisfied the requirements of Section 12 of the Act for his occupational disease, a disease entitling him to the extended time periods for giving notice of a work-related injury and for filing a claim for benefits therefor, and I so find and conclude.

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (19889). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS

100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

Section 13(d) specifies that the one (1) year statute of limitations is tolled by the pendency of a state workers' compensation claim. **Ingalls Shipbuilding Division, Litton Systems, Inc. v. Hollinhead**, 571 F.2d 272 (5th Cir. 1978); **Smith v. Universal Fabricators**, 21 BRBS 83 (1988), **aff'd**, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989); **Calloway v. Zigler Shipyards, Inc.**, 16 BRBS 175 (1984); **Saylor v. Ingalls Shipbuilding**, 9 BRBS 561 (1978); **George v. Lykes Bros.**, 7 BRBS 877 (1978); **McCabe v. Ball Builders, Inc.**, 1 BRBS 290 (1975). The burden of establishing the elements of Section 13(d) is on the claimant. **George**, **supra**, at 880. I find and conclude that Claimant has sustained his burden on this issue. The mistaken filing of a claim under a state workers' compensation law constituted a suit for damages within the meaning of Section 13(d) and thus tolled the Section 13(a) one (1) year statute of limitations.

In a proceeding where the employee missed no time from work due to his 1981 accident until 1983, the Circuit Court of Appeals for the Eleventh Circuit held (1) that the proper test under Section 13(a) is the awareness of the suffering of a compensable injury and (2) that the statute of limitations does not begin to run until the claimant is aware of the full character, extent and impact of the harm done to him. Thus, Claimant must know that there was an injury which constituted an impairment of his/her earning power. In that case, the employee filed his claim for benefits more than twelve (12) months after his 1981 accident, and the Court held that the claim was filed timely as the employee did not miss work until 1983, at which time his back problems worsened and had an adverse effect upon his wage-earning capacity. **Brown v. Jacksonville Shipyards**, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990).

Section 30(f) provides that where an employer/carrier has been given notice or the employer (or his agent) or carrier has knowledge of an employee's injury or death and the employer/carrier fails to file a report as required by Section 30(a), the Section 13(a) time limitation period does not begin to run against the claim until the report is filed with the District Director. **See** 20

C.F.R. §702.205; **Maddon v. Western Asbestos Company**, 23 BRBS 55 (1989); **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989); **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd** 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989); **Patterson v. Savannah Machine & Shipyard**, 15 BRBS 38 (1982); **Williams v. Washington Post Co.**, 13 BRBS 366 (1981).

As already noted above, the record reflects that the Employer did not file the Form LS-202, the required form pursuant to Section 30(f), but instead filed the Form LS-215 - the Employer's Answer to the Claim for Compensation. Thus, the claim for benefits filed herein is timely as the statute of limitations of Section 13(b)(2) has been tolled herein.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS

156 (1985).

In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total disability from August 27, 1998 to date and continuing. Moreover, the issue of permanency has not yet been considered by the District Director. (ALJ EX 2) In this regard, **see Seals v. Ingalls Shipbuilding, Division of Litton Systems, Inc.**, 8 BRBS 182 (1978). Claimant also seeks temporary partial benefits from November 1, 1997 to August 27, 1998. As Claimant's post-hearing (CX 22) and post-remand briefs (CX A) all silent on this issue, I am unable to award benefits for those closed periods of time.

The Employer submits that Claimant has failed to satisfy his burden of proving disability, the Employer pointing out that in the case at bar,

"The Benefits Review Board has stated that an "aggravation is compensable regardless of whether the employment actually altered the underlying disease process or whether it merely induced the manifestation of symptoms." Decision and order BRB, page 5. The Employer does not dispute this principle. The Employer does, however, dispute the Board's application of the cases it cited to this particular case," the Employer valiantly attempting to distinguish **Crum, supra**, and **Gardner, supra**, the latter involving a landmark decision relating to this Employer.

Moreover, according to the Employer, in order for Mr. Preston to receive benefits, he must prove that he has suffered a disability. A disability is an economic and not a medical concept. **American Mutual Insurance Co. of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). The case law is clear that questions relating to the nature and extent of disability do not benefit from the Section 20(a) presumption, because the claimant is fully able to muster evidence on this point. **See Brochato v. Universal Maritime Service Corp.**, 9 BRBS 1073 (1978). A claimant has to demonstrate an inability to perform his or her usual job before the employer has to rebut by establishing the availability of other jobs that the claimant could perform. **Crum**, 738 F.2d at 479. The evidence in this case all points to the fact that there is nothing preventing Mr. Preston from returning to work at BIW in his previous capacity. Mr. Thibotout, who worked with Mr. Preston daily, stated that there were no safety issues relating to Mr. Preston's nervous condition and that he did not feel Mr. Preston's nervous condition interfered with his ability to do his work. **See** Transcript at page 93. Dr. Carinici recommended that Mr. Preston leave work, however she was given inaccurate medical history and was unaware of Mr. Preston's condition. Moreover, the leg symptoms that were the foundation for her opinion were inconsistent with the neurological condition and not present at subsequent examinations. Employer Exhibit #24. Dr. Kolkin stated that it is unfortunate that Mr. Preston is not working because, given some latitude and encouragement, there is no

reason why he could not be doing the job he was doing before. See Dr. Kolkin deposition transcript, page 36-37. Dr. Bourne's conclusion was the same. Therefore, Mr. Preston has failed to establish disability and his claim should be denied, according to the Employer. (EX A at 37-38)

However, I disagree with the Employer for the following reasons. Initially, I note that the totality of this closed record leads inescapably to the conclusion that Claimant cannot return to work as a crane operator at the Employer's shipyard. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability as the Employer has introduced no evidence relating to the existence of suitable alternate employment within his work restrictions. In so concluding, I have credited the following medical opinions.

The Employer's witnesses gave the most useful evidence on the question of whether Claimant could continue to work at Bath Iron Works. Dr. Kolkin testified that Michael Preston could work only in a "calm, supportive environment." When asked whether harassment, ridicule, name-calling and practical jokes designed to exacerbate Claimant's shaking and twitching was a "calm, supportive environment" he and his lawyer evaded the question for three pages of questioning. Obviously shipyards, even under the best of circumstances are not calm; and the harassment Claimant faced every day was hardly supportive, and I so find and conclude.

Claimant's supervisor Luke Thiboutot acknowledged that Claimant was subjected to name-calling and practical jokes. He also testified that Michael's involuntary jerking had become so bad that co-workers were concerned about whether he was able to work in safety. He also said he relied on Claimant's judgment about whether he could control himself well enough to be a safe worker. Claimant left the shipyard when he felt he could no longer safely do his job, and I so find and conclude.

Dr. Staendert, one of his treating physicians, stated unequivocally that Claimant could not safely operate heavy equipment:

> "His symptoms substantially limit his ability to perform manual tasks with his hands such as writing, and lifting and have made it impossible for him to control the heavy

machinery necessary on his previous job as a crane operator, according to his doctors."

Finally, Dr. Carinci took Claimant out of work because the stress had so exacerbated his shaking, that she believed he could no longer continue his job because of the damage it was doing to his health.

Thus, Claimant has established a **prima facie** case for total disability, and as the Employer has not even attempted to rebut by showing the existence of suitable alternate employment, I find and conclude that Claimant has been totally disabled since August 27, 1998 and such disability continues through the present and will continue until further vacating **ORDER** of the BRB or of the U.S. Court of Appeals for the First Circuit.

In fact, the medical evidence establishes that all of the doctors who have expressed an opinion on Claimant's ability to operate a crane are in agreement that he cannot safely do so.

Because the medical evidence is unclear about how long the effects of stress last, Michael Preston asserted a claim for temporary benefits only. Now that he has been out of the stressful environment of BIW, he has reported an improvement. He told Dr. Bourne that he was 50% improved compared to when he was when he left BIW. However, he has not returned to where he was before he went to work at BIW. His current level of symptoms still represents a progression since he first went to BIW, even though the doctors all believe that myoclonus is not normally progressive.

He is totally disabled because he is not able to return to his work at BIW and BIW has not shown the existence of any job at BIW or anywhere else. There are two reasons he cannot return to his job at BIW. First, the stress made his symptoms so much worse that his treating doctor, Dr. Carinci, took him out of work because he could not safely operate a crane. He was also losing more and more time due to stress. Secondly, Claimant no longer felt he could safely operate cranes and do rigging. In his testimony, Luke Thiboutot said that other workers questioned Claimant's safety. Mr. Thiboutot said he relied on Claimant's judgment about whether he could work safely. One of the primary reasons Claimant left was that he no longer felt that he could rig or operate the crane safely. He testified that he had a number of close calls and those close calls added to the stress, because he no longer felt he was safe to be in the yard. If he stayed, he would eventually have a bad accident hurting himself or others. (TR 25-29)

Because the evidence shows that Claimant can no longer do the job he was doing at the time he suffered the stress injury, he is totally disabled. BIW's evidence supports his contention that he

cannot do his old job because Luke Thiboutot relied on his judgment about whether he could safely do his job. He said that it did interfere with him working on the cherry picker and hooking up loads because he would shake when he had to attach something. BIW introduced no evidence that it ever offered to modify his job to accommodate his myoclonus or that there are any other jobs that he could do with his disability. Indeed, Seth Kolkin, BIW's independent medical examiner, testified that Claimant could work in a calm, supportive environment. The rest of the evidence showed that Claimant's job at BIW was anything but calm and supportive. (CX 20 at 36-38) Therefore the presumption that he is totally disabled is not rebutted.

Accordingly, Claimant is entitled to an award of temporary total benefits from August 27, 1998 and continuing until further **ORDER** of this Court.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a

claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983). Accordingly, this Administrative Law Judge should include the weeks of vacation as time which claimant actually worked in the year preceding his injury. **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant apparently did not work for the Employer for the fifty-two (52) weeks prior to his date of injury, according to his wage records in evidence as CX 7. Therefore Section 10(a) is inapplicable. The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds**, 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. **See National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (19987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize

earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree**, **supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

Claimant's wage record reflects wages only from week no. 14 to week no. 52, and he earned $20,456.35 for those 39 weeks. As noted, Section 10(a) cannot be used because he worked 40 or more hours in only 6 weeks.

Pursuant to Section 10(e), Claimant's average weekly wage can be reasonably set as $659.88 (**i.e.**, $30,456.35 ÷ 31 weeks [I have deleted 8 weeks during which he earned no wages])

I note that the parties' briefs are silent on the average weekly wage issue.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22

BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, I find and conclude that the Employer as a self-insurer shall immediately authorize and pay for the reasonable and necessary medical care and treatment in the diagnosis and treatment of Claimant's paramyclonus multiplex, commencing on September 22, 1989, (CX 10) subject to the provisions

of Section 7 of the Act.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits once served a copy of the claim for compensation.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer as a self-insurer. Claimant's attorney has not submitted her fee application. Within thirty (30) days of the receipt of this Decision and Order, she shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's

counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after June 16, 1999, the date of the informal conference and up to January 2, 2001, the date of my initial decision, and between January 15, 2002 and the date of this decision on remand. Services performed outside of those dates should be submitted to the District Director and/or to the BRB for their consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from August 28, 1998 through the present and continuing, based upon an average weekly wage of $659.88, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, commencing on September 22, 1997, subject to the provisions of Section 7 of the Act.

4. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred between June 16, 1999 and January 2, 2001 and between January 15, 2002 and the date of this decision on remand.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl